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No. 89-1119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PATRICK A. HERRING, JR., et al.,
Petitioners,
vs.
DELTA AIR LINES, INC., and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where Labor Protective Provisions, which were provided by Delta Air Lines in connection with Delta's merger with Western Air Lines, provide that seniority lists are to be integrated by agreement between Delta and the representatives of the affected employees, with arbitration authorized "by either party" "in the event of failure to agree"; and where a seniority agreement was reached between Delta and the authorized representatives of both the Delta and Western pilots; do individual pilots have the right to institute arbitration proceedings seeking to set aside the agreement and rewrite the seniority list?

LIST OF PARTIES

The petitioners are the pilots listed on pages 27a-44a of the Appendix to the Petition.

The respondents are Delta Air Lines, Inc.* and the Air Line Pilots Association, International.

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* Pursuant to Rule 28 of the Rules of this Court, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; Gatwick Handling, Ltd.; SkyWest, Inc.; and WORLDSPAN, L.P.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petition for certiorari seeks to escape a well-established interpretation of Labor Protective Provisions ("LPPs") provided by Delta Air Lines, Inc. ("Delta") in its merger agreement with Western Air Lines, Inc. ("Western"). Although petitioners seek to elevate the significance of this case by asserting that it involves important policy considerations under both the Railway Labor Act (RLA) and the Federal Arbitration Act, in fact it involves nothing more than affirming long-established principles as to whether Sections 3 and 13 of the LPPs require arbitration under a particular set of facts. Given

that the decisions of both the district court and the Ninth Circuit correctly interpreted these sections consistent with those principles, certiorari would serve no useful or appropriate purpose and should be denied.

The LPPs upon which petitioners attempt to rely are a special set of provisions to protect employees in a merger. Among other things, the LPPs, which were standardized by the Civil Aeronautics Board (CAB) in the *Allegheny-Mohawk Merger Case*, 59 CAB 22 (1972), require that provisions be made for integrating the seniority lists of the two merging carriers in a fair and equitable manner. Specifically, Section 3 of the LPPs provides:

> Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, *agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.* [emphasis added].

Section 13 of the LPPs sets forth the *procedure* for conducting arbitration.

Inasmuch as both Western's and Delta's pilots were represented by the Air Line Pilots Association (ALPA), the two pilot groups, pursuant to ALPA's Merger Policies, elected merger committees to act as their representatives in an attempt to negotiate a single seniority list which they would request Delta to accept. Because Delta's collective bargaining agreement with ALPA gave

Delta the right to approve the integration of the seniority lists[1], and because Section 3 of the LPPs contemplates carrier involvement, Delta representatives met with the merger committees on a number of occasions to inform the committees of Delta's views and to assist the committees in reaching an agreement that all parties could accept as fair and equitable. During this process, Delta consistently stated that the list must be fair to both sides and that neither group should receive a windfall at the expense of the other.

On May 28, 1987, the Delta and Western pilots merger committees reached agreement on an integrated list and Delta signed an agreement accepting the list. Petitioners contend that the list is not fair and equitable to the former Western pilots primarily because date-of-hire was not the principal basis for integrating the two groups, and because "equipment ratios" was a primary element establishing the list.[2] In fact, many different kinds of integration methods have been used and upheld as fair and equitable by the CAB, arbitrators and courts.

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[1] Section 1.B.3.b of the 1986-1989 collective bargaining agreement between Delta and ALPA provides that in the event Delta acquires another airline: "The integration of the seniority lists of the two pilot groups shall be subject to approval by the Company."

[2] The term "equipment ratios" refers to a system designed to assure that no pilot would suffer a decline in earnings or flight status as a result of the merger, and that all pilots would share equitably in the post-merger growth of the airline. Since pilot earnings are based both on the position a pilot holds (captain, first officer, second officer) and the size of the aircraft (or "equipment") a pilot operates, the "equipment ratio" seniority integration system was designed so that a pilot who, for example, had sufficient seniority to hold a B-727 captain position prior to the merger would not be "bumped" from that position as a result of the merger. Thus, the seniority list was structured in groupings related to the number and type of pilot positions brought to the merged airline by each pilot group.

Various factors besides mere length of service and date of hire have been utilized and permitted in order to preserve each group's relative premerger rights and equities, and in order to insure that any gains and losses as a result of the merger are distributed equitably throughout the merged list. *Northeast Master Exec. Council v. CAB*, 506 F.2d 97, 104-05 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

Petitioners' attempt to reform the integrated seniority list through arbitration suffers from three fatal flaws. First, in order to compel arbitration under the RLA or Federal Arbitration Act, there must be an underlying agreement to arbitrate. The Ninth Circuit correctly ruled that the particular agreement relied upon by petitioners — Sections 3 and 13 of the LPPs — does not provide a basis for arbitration when, as here, the surviving carrier and the employees' collective bargaining representative reach agreement on seniority integration.

Second, to allow arbitration after a collectively bargained agreement has been reached between authorized union representatives and an employer would be contrary to nearly 50 years of this Court's precedent. National labor policy places in the collective bargaining representative's hands the *exclusive* authority to bargain on behalf of and bind the entire bargaining unit. Petitioners' attempt to abrogate the seniority integration agreement between ALPA and Delta runs counter to this policy and is not supported by RLA, Federal Arbitration Act or CAB precedent.

Third, by ruling that ALPA did not breach its duty of fair representation in its negotiating and entering into the seniority integration agreement, the Ninth Circuit eliminated the only possible basis for challenging that agreement. Indeed, the lower court relied upon well-established authority in holding that the inevitable

dissatisfaction on the part of some employees with the results of the seniority integration process does *not* support a finding of a breach of this duty. Moreover, given that this aspect of petitioners' case involves unique facts, *e.g.*, allegations that the pilot representatives were "coerced" by Delta and that various ALPA merger policies were not followed, the assertion that the Ninth Circuit erred in deciding this issue is an inadequate reason for granting certiorari.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS' ARBITRATION REQUEST WAS PROPERLY DENIED INASMUCH AS THERE WAS NO SPECIFIC AGREEMENT TO ARBITRATE

It is well-settled that "[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed to so submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Here, petitioners' request for arbitration is based on Sections 3 and 13 of the LPPs. Yet nowhere in those sections — or anywhere else for that matter — is there any provision establishing the right of individual pilots to compel arbitration in order to abrogate or rewrite a seniority list integration agreement negotiated by the pilots' representatives.

Section 3 of the LPPs provides for "agreement [regarding the merger of seniority lists] through *collective bargaining between the carriers and the representatives of the employees affected.*" [emphasis added]. That language plainly refers to Delta as the "carrier" (inasmuch as Western ceased to exist after the merger), and the designated ALPA representatives as "representa-

tives of the employees" since ALPA had represented both the Delta and Western pilots prior to the merger. Because the next sentence in Section 3, providing for arbitration "*by either party*" "*in the event of failure to agree*" [emphasis added], refers to what will occur if the *carrier* and *representative* do not agree on a merged seniority list, the Ninth Circuit correctly held that Delta and ALPA are the only "parties" under Section 3, that only they can trigger the arbitration process under the LPPs, and that arbitration can occur only if they fail to reach an agreement. (Pet. 4a)

Petitioners' characterization of the Ninth Circuit's decision as "thwart[ing] the strong federal policy of enforcing agreements to arbitrate" is grossly misleading. (Pet. 7) Likewise misleading is the assertion that the "lower court's decision has created a large loophole in the federal arbitration scheme where an employee's [*sic*] promise to arbitrate airline-merger related labor disputes is not enforceable." (*Id.* p. 8) In fact, the Ninth Circuit merely confirmed that there is no right to arbitrate under Section 3 of the LPPs when the collective bargaining representative of the affected employees and the surviving carrier agree on seniority integration. Rather than making any sweeping pronouncement regarding the enforceability of arbitration provisions in airline mergers, the lower court reviewed the language of Section 3 — the linchpin of petitioners' arbitration claims — and ruled that it did not provide a basis for arbitration when the carrier and union reach an agreement.

Contrary to petitioners' arguments, the holding that there is no right to arbitrate when the union and carrier agree on seniority integration is entirely consistent with both CAB and court decisions. For example, in *Pan American-Acquisition of, Control of and Merger with National*, CAB Order 82-4-75 (1982), the CAB said "We

have long held that, pursuant to Section 3, the surviving carrier of an acquisition or merger and the affected employees (*by their representatives in terms of the Railway Labor Act if they are organized*) are responsible for integrating seniority lists. *Only when the carrier and the employees' representatives disagree on seniority, do we intrude, by insuring that the parties arbitrate.*" [emphasis added] (p. 2).

Moreover, once there is an agreement between the collective bargaining representative and the carrier, that agreement will not be set aside absent a showing of bad faith or a breach of the duty of fair representation. *Delta - C&S Seniority List*, 29 CAB 1347 (1959), *aff'd sub nom. Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960). This rule ensures stability in labor relations since, as the CAB has pointed out, any other holding would mean that

> carriers and airline unions could not rely on the validity of seniority lists put forth by designated employee representatives for purposes of collective bargaining. *That state of affairs would not be in the public interest.* [emphasis added].

Delta-Northeast Merger Case, CAB Order 73-1-24 at p. 5 (1973), *aff'd sub nom. Northeast Master Exec. Council v. CAB*, 506 F.2d 97 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

Indeed, petitioners' suggestion (Pet. 9) that the national labor policy calling for the peaceful and prompt resolution of labor issues would be served by overriding a collectively bargained agreement is absurd. Collective bargaining is premised on a group of employees delegating their power to deal with their employer to an author-

ized representative. If an agreement reached through collective bargaining was subject to arbitral review whenever some of the employees disagreed with it, then no negotiated agreement could survive. Such a result would be directly contrary to over 60 years of national labor policy.[3]

II. THE DENIAL OF PETITIONERS' ARBITRATION REQUEST UNDER THE LPPs WAS ENTIRELY CONSISTENT WITH ESTABLISHED RLA PRECEDENT

A. The RLA Does Not Permit Arbitration in This Case

Petitioners' argument (Pet. 11-13) that the RLA imposes upon Delta a duty to arbitrate the seniority list integration under the LPPs demonstrates a fundamental misunderstanding of both the RLA and the LPPs. Ordering arbitration for the purpose of abrogating or rewriting the integrated seniority list agreed to in collective bargaining would violate what petitioners agree is the "heart" of the RLA — the duty to "make and maintain contracts." It is well settled that individual members of a collective bargaining unit do not have the right to negotiate separate agreements or obtain separate rights when such agreements or rights are inconsistent with the collective bargaining agreement or would circumvent the

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[3] The delay caused by arbitration of seniority integration disputes is well documented. If such a proceeding had occurred here, then it likely would have taken one or two years to complete. Thus, instead of having in place a collectively bargained seniority list in 1987, the parties might have had to wait until 1989 to know where they stood.

authority of the collective bargaining representative. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944); *Hendricks v. Air Line Pilots Assn.*, 696 F.2d 673 (9th Cir. 1983). As this Court has stated:

> *The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees* with terms which reflect the strength and bargaining power and serve the welfare of the group. [emphasis added].

J.I. Case Co. v. NLRB, supra, 321 U.S. at 338.

Because a collective bargaining representative has the exclusive power to bind *all* employees in a collective bargaining unit, and since employees are prohibited from entering into individual contracts that are contrary to the collective bargaining agreement, a carrier and a collective bargaining representative cannot be required by a purported contract between the carrier and groups of employees to arbitrate an issue which has already been resolved in the collective bargaining agreement. Yet this is exactly the relief that petitioners seek here. They contend that they are third-party beneficiaries to the contract between Delta and Western which provided for the LPPs, and that under the LPPs they — as individuals — are entitled to compel arbitration even though the collective bargaining agreement between ALPA and Delta settles the very issue they seek to arbitrate. Simply put, the arbitration they seek would necessarily abrogate the collectively bargained seniority integration agreement which, under the RLA, both ALPA and Delta are required to maintain. Nothing could be more repugnant to the "heart" of the RLA.

Moreover, by reaching agreement on seniority integration, Delta and ALPA complied with both the RLA (by making and maintaining a collective bargaining agreement with respect to seniority integration) and with the LPPs (by collectively bargaining the integration of seniority of the two merging pilot groups pursuant to Section 3). If the LPPs were inconsistent with the RLA, *i.e.*, if they were interpreted to require the abrogation of a collective bargaining agreement entered into pursuant to the RLA, then they plainly would not be enforceable under the RLA. The LPPs are not, however, inconsistent with the RLA. Rather, they provide for integration of seniority lists through collective bargaining where the employees are represented by a union, and arbitration only when there is no agreement between the carrier and union. *Delta - C&S Seniority List, supra*, 29 CAB 1347, 1349.

Petitioners' reliance on cases in which courts have ordered arbitrations under the LPPs is misleading. (Pet. 11-14) Those cases involve disputes between a carrier and a group of employees *not* represented by an authorized collective bargaining representative. Thus, in *Delta Air Lines, Inc. v. CAB*, 574 F.2d 546 (D.C. Cir.), *cert. denied*, 404 U.S. 1015 (1972), Delta did not dispute the right of the dissatisfied flight attendants to seek arbitration under the LPPs since, in contrast to the case at hand, they were *not* represented by an authorized collective bargaining representative, and there had been no agreement.

Likewise, the RLA never has been interpreted to require arbitration of every dispute that supposedly relates to LPPs. Contrary to petitioners' assertion (Pet. 12-13), RLA Sections 151a and 152 First and Second do not require the carrier and collective bargaining representative to resolve *any* dispute that might arise, but

instead are limited to compelling prompt resolution of disputes *arising out* of a collective bargaining agreement. As established in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 229 F.2d 926, 929 (7th Cir. 1956), *aff'd*, 353 U.S. 30, *reh'g denied*, 353 U.S. 948 (1957), these provisions contemplate "the existence of a collective agreement already concluded," and disputes which relate to either the meaning or proper application of a particular provision in such an agreement.

B. The Ninth Circuit Properly Rejected Petitioners' Breach of Duty of Fair Representation Claim

Petitioners' argument that the Ninth Circuit failed to consider fully their duty of fair representation claim (Pet. 14-16) raises no issue that warrants review by this Court. Petitioners fail to point to any error of law in the lower court's opinion, instead rearguing the same facts that led the Ninth Circuit to conclude that there was no evidence that ALPA breached its duty of fair representation particularly since "[t]he courts allow a union a 'wide range of reasonableness' in the conduct of the representation of its members." (Pet. 6a) This Court has held on a number of occasions that a collective bargaining representative does not violate its duty of fair representation in negotiating a seniority list which has adverse affects on some of its members:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of

> such differences does not make them invalid. *The complete satisfaction of all who are represented is hardly to be expected.* [emphasis added].

Ford Motor Co. v. Huffman, 345 U.S. 330, 333 (1953). *See also Humphrey v. Moore*, 375 U.S. 335, 349, *reh'g denied*, 376 U.S. 935 (1964) ("We are not ready to find a breach of the [union's] duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against another.")

Here, petitioners' duty of fair representation claim is based on a wide range of allegations, including assertions that the Western pilot representatives were intimidated by Delta, that various ALPA merger policies were not followed, and that ALPA's president acted improperly in the seniority integration process. In considering these allegations, the lower court ruled that the petitioners' "unsupported statements . . . provide no concrete evidence that ALPA breached the duty of fair representation." (Pet. 6a) In seeking certiorari, petitioners are asking this Court to review the same facts which were carefully considered and found wanting by both the district court and the Ninth Circuit.

In short, given (1) the unique set of facts surrounding the duty of fair representation claim, and (2) petitioners' inability to suggest anything more than the lower court's failure to consider fully these facts, there is no reason to grant certiorari on this basis.

III. THE NINTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT IN THE CIRCUITS CONCERNING FEDERAL ARBITRATION ACT ENFORCEMENT PROVISIONS

Petitioners' final effort to create a basis for granting the writ is their assertion that the Ninth Circuit's opinion causes a conflict in the circuits with respect to the scope of the Federal Arbitration Act's enforcement provisions. (Pet. 16-17) Petitioners' argument is premised on their speculation that the Ninth Circuit's statement, that the Federal Arbitration Act requires "a written agreement between the parties to arbitrate" (Pet. 5a), means that the court refused to enforce the LPPs because the Western pilots were not parties to the merger agreement.

In fact, nothing in the lower court's opinion supports this speculation. The opinion does not discuss this purported issue, nor is there any reason to assume that the Ninth Circuit's holding means anything other than arbitration will not be ordered when there is no agreement to arbitrate. Of course, under Section 3 of the LPPs there was no basis for arbitration once Delta and ALPA reached a seniority integration agreement.[4]

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[4] Similarly, the absence of an agreement requiring arbitration undercuts petitioners' assertion (Pet. 16) that the lower court erred in applying the "contracts of employment" exclusion of Section 1 of the Federal Arbitration Act. Without an agreement to arbitrate, the Federal Arbitration Act has no application to this case.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

DATED: February 14, 1990

Respectfully submitted,

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